

THE FEDERAL BUREAU OF INVESTIGATION REFORM ACT
OF 2002

MAY 10 (legislative day MAY 9), 2002.—Ordered to be printed

Mr. LEAHY, from the Committee on the Judiciary,
submitted the following

R E P O R T

[To accompany S. 1974]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to which was referred the bill (S. 1974) to make needed reforms in the Federal Bureau of Investigation, and for other purposes, having considered the same, reports favorably thereon, with an amendment, and recommends that the bill, as amended, do pass.

CONTENTS

	Page
I. Purpose and summary	1
II. Legislative history	3
III. Vote of the Committee	4
IV. The need for legislation	4
V. Discussion and section-by-section analysis	7
VI. Congressional Budget Office cost estimate	23
VII. Regulatory impact statement	25
VIII. Changes in existing law	26

I. PURPOSE AND SUMMARY

The purpose of S. 1974, the Federal Bureau of Investigation Reform Act of 2002, is to make needed reforms to strengthen effective oversight, enhance security, and improve management of the Federal Bureau of Investigation (“FBI” or “Bureau”). Specific provisions would strengthen oversight by the Inspector General of the Department of Justice, increase protections for FBI whistleblowers, improve security for FBI and related Justice Department information and facilities, provide reports needed by the Congress, and eliminate disparities in discipline between Senior Executive Service officials and other personnel.

The legislation is based on a series of bipartisan FBI oversight hearings that began in the summer of 2001. These hearings included testimony on Senator Danforth's Waco inquiry, the Webster Commission report on security in the FBI, and Justice Department Inspector General's report on the FBI's belated disclosure of documents in the Oklahoma City bombing case, as well as testimony from rank-and-file FBI agents, the Department of Justice's current and former Inspectors General, and the FBI's senior administrative, security and computer infrastructure managers. These hearings revealed institutional problems at the FBI that require congressional action.

The hearings highlighted (1) a double standard in disciplinary actions for senior FBI management causing morale problems within the Bureau; (2) record and information management problems and communications breakdowns between field offices and Headquarters that contributed to the belated production of documents in the Oklahoma City bombing case; (3) a dire need to modernize FBI computer systems, despite significant budget increases granted to the FBI over the last five years; (4) a culture that not only discourages FBI employees from reporting problems or wrongdoing, but permits retribution against the relatively few FBI employees who do "blow the whistle" on misconduct; (5) lax FBI security and personnel procedures that allowed FBI supervisor Robert Hanssen to sell critical secrets to the Russians undetected for years, without ever getting a polygraph; and (6) no fewer than 15 different areas of security at the FBI that need fixing.

The FBI Reform Act targets three goals: to improve accountability and oversight of the FBI, to enhance security both inside and outside of the FBI, and to prepare the FBI for the missions it faces in the 21st Century.

The bill improves accountability through three reforms:

- (1) codifying the Justice Department Inspector General's authority to investigate all allegations of misconduct at the FBI—not just those referred by the FBI's Office of Professional Responsibility;
- (2) strengthening whistleblower protections for FBI employees who report misconduct; and
- (3) ending the "double standard" in the FBI, where senior management officials are not disciplined as harshly as line agents for the same types of misconduct.

The bill improves security both inside and outside the FBI through four reforms:

- (1) creating a Career Security Program in the FBI, to ensure that the FBI has a trained professional cadre of people who can protect against future Hanssen cases;
- (2) establishing a polygraph program to increase security at the same time as protecting employee rights;
- (3) improving the statutory authority for the FBI police, so that the most qualified people can be retained to protect some of the most sensitive terrorist targets in our nation; and
- (4) strengthening Justice Department security to protect sensitive FBI information shared with Justice, including Foreign Intelligence Surveillance Act information.

The bill helps prepare the FBI for 21st Century national security and public safety challenges in three ways:

(1) requiring a report on the statutory authorities and core mission of the FBI to help guide the FBI in better focusing its activities;

(2) requiring a specific 10-point plan to modernize the FBI's information technology systems to improve information flow and proper sharing; and

(3) requiring a General Accounting Office ("GAO") report on the compilation and use of duplicative case statistics by the FBI and other federal law enforcement agencies.

II. LEGISLATIVE HISTORY

The "Federal Bureau of Investigation Reform Act of 2002," S. 1974, was introduced by Chairman Patrick Leahy and Senator Charles Grassley on February 28, 2002. The bill was a product of Judiciary Committee hearings held beginning in June 2001, on FBI oversight, management, information technology and security, as well as the confirmation hearing for the new Director of the FBI, Robert S. Mueller III. After the bill's introduction, additional hearings related to S. 1974 were held in March and April 2002, to consider the need for FBI information technology and management reforms in light of the report of the Justice Department Inspector General on the belated disclosure of FBI documents in the Oklahoma City bombing case and to address the need for FBI security reforms as identified in the report of the Webster Commission, which was charged with reviewing FBI security in the wake of the Robert Hanssen espionage case.

Provisions of title I of S. 1974 to strengthen the authority of the Justice Department Inspector General to provide oversight and review of FBI and Drug Enforcement Administration matters were also contained in the "21st Century Department of Justice Appropriations Authorization Act," S. 1319/H.R. 2215, which was introduced by Chairman Patrick Leahy and Senator Orrin Hatch, reported by the Judiciary Committee and passed by the Senate by unanimous consent on December 20, 2001.

On April 25, 2002, the Senate Judiciary Committee favorably and unanimously reported S. 1974, by voice vote, with an amendment in the nature of a substitute offered by Chairman Leahy and cosponsored by Senator Grassley. The substitute amendment modified S. 1974, as introduced, in the following ways:

(1) Section 101, p. 3, lines 1–19, was added to clarify the Office of Inspector General's authority over heads of Justice Department components;

(2) Section 302(b), p. 10, lines 8–9, was added to clarify that FBI security personnel management policies are to be implemented at both the headquarters and field office levels;

(3) Section 702, pp. 31–32, was added to require the Office of Inspector General to submit to the Judiciary Committees, for five years, annual reports prepared by the FBI's Office of Professional Responsibility, including an analysis of any double standard in FBI discipline;

(4) Title VIII, pp. 32–34, was added, based on concerns of the Webster Commission, to enhance security at the Justice Department where sensitive FBI information is shared, including secure communications for processing of FISA matters.

III. VOTE OF THE COMMITTEE

The Senate Committee on the Judiciary, with a quorum present met on April 25, 2002 to consider the “Federal Bureau of Investigation Reform Act of 2002.” The Committee considered S. 1974 and approved the bill, by unanimous voice vote, with an amendment in the nature of a substitute, and ordered the bill to be reported favorably to the Senate, with a recommendation that the bill do pass.

IV. THE NEED FOR LEGISLATION

The need for the FBI Reform Act is predicated on an appreciation of both the FBI’s importance to the nation and the serious concerns about FBI performance that have arisen in recent years. The FBI is responsible for the investigation of federal crimes, the conduct of intelligence and counterintelligence activities, and the provision of services to the United States law enforcement community, including at the Federal, State and local levels. With more than 25,000 personnel and a budget of over \$4 billion, the FBI is essential to combating serious and complex criminal activity, protecting the national security against terrorism and espionage, and serving all federal, state, and local law enforcement agencies with training, laboratory and fingerprint examinations, and centralized crime information. After the terrorist attacks of September 11, 2001, and the subsequent anthrax attacks in the fall of 2001, the nation turned to the FBI for expanded investigation, intelligence collection, analysis and information sharing to detect terrorists and frustrate any potential plans for additional attacks. The new anti-terrorism law, the USA PATRIOT Act,¹ enacted on October 26, 2001 after passing overwhelmingly in the Congress, gave the FBI wider investigative and intelligence-information gathering powers. In an emergency counterterrorism supplemental appropriation for FY 2002, the Congress added \$745 million to the FBI’s budget for investigative and intelligence capabilities, information technology, and security. An additional increase of \$225 million is requested for FY 2003.

The FBI’s critical and growing responsibilities make it all the more necessary to confront the serious weaknesses in the Bureau’s management and operations that have come to light in recent years. In the 1990s the tragic violent confrontations at Ruby Ridge and Waco, and subsequent flawed internal investigations, led to further inquiries, including an independent investigation of Waco events by former Senator John Danforth, that exposed failures of FBI officials to be candid in admitting errors.² Highly publicized investigative mistakes in the Atlanta Olympics bombing case and the Wen Ho Lee espionage investigation raised questions about the competence and judgment of FBI officials.³

¹Pub. L. No. 107–56 (2001).

²Office of Special Counsel; Report to the Deputy Attorney General Concerning the Waco Matter (2000).

³“Lee Family ‘Shocked’ by FBI Tactics,” Albuquerque Journal, January 9, 2000. Dan Eggen, “FBI Won’t Apologize to Cleared CIA Officer,” Washington Post, August 13, 2001. Ronald Kessler, “Time to Fire FBI Director,” Washington Post, March 2, 2001. Laurie Cohen and David Cloud, “Counterintelligence: How Federal Agents Bungled the Spy Case Against Wen Ho Lee,” Wall Street Journal, December 8, 2000. Eric Lichtblau, “Tough Criticism Pelts the FBI,” Los Angeles Times, January 21, 2001. See Senator Patrick Leahy Statement, 2000 Cong. Rec. S1226–1228 (daily ed. Mar. 7, 2000).

This bill stems from the lessons learned during a series of Committee hearings on oversight of the FBI from June 2001, through April 2002, including hearings on the Webster Commission review of FBI security in the wake of the Hanssen espionage case⁴ and the Justice Department Inspector General's report on the belated FBI disclosure of documents in the Oklahoma City bombing case.⁵ The important changes which are being made under the FBI's new leadership after the September 11 attacks and the new powers granted to the FBI under the USA PATRIOT Act have rendered FBI reform a pressing matter of national importance.

Since the attacks of September 11, 2001, and the anthrax attacks last fall, the FBI has had the responsibility to detect and prevent acts of catastrophic terrorism that endanger the lives of the American people and the institutions of our country. The men and women of the FBI are performing this task with great professionalism at home and abroad. All Americans felt safer as a result of the full mobilization of the FBI's dedicated Special Agents, its expert support personnel, and its exceptional technical capabilities.

For decades the FBI has been an outstanding law enforcement agency and a vital member of the United States intelligence community. As the hearings and recent events have shown, however, there is room for improvement at the FBI. Only needed reform can ensure that the mistakes of the past are not repeated. In meeting the international terrorist challenge, the Congress has both an opportunity and obligation to strengthen the institutional fibre of the FBI based on lessons learned from recent problems the Bureau has experienced.

This view is not the Committee's alone. When Director Robert S. Mueller testified at his confirmation hearings last July, he forthrightly acknowledged "that the Bureau's remarkable legacy of service and accomplishment has been tarnished by some serious and highly publicized problems in recent years. Waco, Ruby Ridge, the FBI lab, Wen Ho Lee, Robert Hanssen and the McVeigh documents—these familiar names and events remind us all that the FBI is far from perfect and that the next director faces significant management and administrative challenges."⁶ Since then, the Judiciary Committee has forged a constructive partnership with Director Mueller to get the FBI back on track.

The Congress sometimes has followed a hands-off approach towards the FBI. The FBI's new increased powers, the nation's increased reliance on the Bureau to stop terrorism, and the President's budget request for increased funding for the Bureau, will require increased scrutiny and oversight. Until reforms underway at the Bureau demonstrate that problems are resolved and new challenges overcome, Congress will have to take a hands-on approach.

Indeed, Committee hearings and other oversight activities have highlighted tangible steps the Congress should take in an FBI Reform bill as part of this hands-on approach. Hearings in 2001 dem-

⁴Statement of Judge William H. Webster, former FBI Director, U.S. Senate Committee on the Judiciary Hearing, "Reforming the FBI in the 21st Century: Lessons of the Hanssen Espionage Case," April 9, 2002, p. 21.

⁵Statement of Bob Dies, FBI Chief Technology Officer, U.S. Senate Committee on the Judiciary Hearing, "Reforming the FBI in the 21st Century: Lessons of the Oklahoma City Bombing Case," March 21, 2002, p. 65.

⁶Statement of Robert S. Mueller III, U.S. Attorney in Northern District of California, U.S. Senate Committee on the Judiciary, "Nominations Hearing," July 30, 2001, p. 25.

onstrated the need to improve FBI internal accountability, extend whistleblower protection, end the double-standard for discipline of senior FBI executives, enhance the FBI's internal security program to protect against espionage as occurred in the Hanssen case, and modernize the FBI's information technology systems. After the initial oversight hearings, the Committee explored additional management issues that are reflected in the FBI Reform Act. Senator Grassley called attention to the practices of the FBI and other federal criminal investigative agencies in over-reporting and misusing statistics on their investigations. In addition, FBI officials responsible for protecting its facilities informed the Committee of difficulties in retaining the most qualified people on the FBI's own police force to protect some of our nation's most important and, unfortunately, most targeted facilities.

When Director Mueller announced the first stage of his FBI reorganization in December 2001, he stressed the importance of taking a comprehensive look at the FBI's missions for the future.⁷ Deputy Attorney General Thompson's office informed the Committee that the Attorney General's management review of the FBI was considering this matter.⁸ Director Mueller has stated that the second phase of FBI reorganization will be part of a "comprehensive plan to address not only the new challenges of terrorism, but to modernize and streamline the Bureau's more traditional functions. . . ."⁹ Thus, through hearings, other oversight efforts, and the statements and efforts of the new management team at the FBI, an initial list of challenges facing the FBI was developed to serve as the basis for S. 1974, as introduced.

Following introduction in February, the need for this legislation was confirmed strongly at the Committee's hearings in March and April on the Webster Commission review of FBI security and the Justice Department Inspector General's report on belated FBI document production in the Oklahoma City case.¹⁰ Based on testimony at these hearings and other information, revisions were made in the bill as introduced, and Senators Leahy and Grassley proposed a substitute for adoption by the Committee.

S. 1974 enjoys bipartisan support, especially among those who have worked with and appeared before the Committee as experts on the FBI's past, the present FBI, and the future of the FBI. The following people, among others, have expressed support for provisions set forth in S. 1974: Department of Justice Inspector General ("IG") Glenn A. Fine; former IG Michael Bromwich; Judge William H. Webster; who headed the Commission charged with reviewing the FBI's security programs ("Webster Commission"); FBI Chief Technology Officer Bob Dies; and FBI Assistant Director for Security Kenneth Senser. The legislation was benefitted enormously from the contributions of many other witnesses and experts who shared their insights with the Committee. The Committee is grateful for the testimony and comments of FBI career professional re-

⁷ Julie Mason, "FBI Alters Course After 9/11 Attacks," *Houston Chronicle*, December 23, 2001.

⁸ Briefing by Associate Deputy Attorney General Christopher Wray to Committee Staff on January 22, 2002.

⁹ Statement of Robert S. Mueller III, Director of the Federal Bureau of Investigation, U.S. House Committee on Appropriations Subcommittee for the Department of Commerce, Justice, and State, the Judiciary, and Related Agencies Hearing, "Fiscal 2003 Appropriations," March 6, 2002, p. 25.

¹⁰ Office of Inspector General; *An Investigation of the Belated Production of Documents in the Oklahoma City Bombing Case* (2002).

sponsibility agents, including Supervisory Special Agent Patrick J. Kiernan and John E. Roberts, Chief of the Internal Investigative Unit at the FBI's Office of Professional Responsibility, and former FBI Foreign Counterintelligence Supervisor John Werner. Former Senator John C. Danforth, former Commissioner of the U.S. Customs Service Ray Kelly, FBI Executive Assistant Director for Administration Robert Chiradio, FBI Assistant Director for Records Management Bill Hooten, and General Accounting Office Managing Director Norman J. Rabkin also provided valuable testimony. The bill is also supported by the National Whistleblower Center and other similar public interest groups that aim to protect both the public interest and the rights of those who report government waste, fraud, and abuse.

V. DISCUSSION AND SECTION-BY-SECTION ANALYSIS

A. DISCUSSION

The provisions in the FBI Reform Act address three challenges, increasing both the oversight and accountability at the FBI, improving the security of the FBI, and preparing the FBI for the 21st century. Each of the bill's provisions should be understood and interpreted in that context, as further discussed below.

1. Oversight and accountability

Titles I, II, and VII of the FBI Reform Act would strengthen the system for uncovering and reviewing FBI misconduct and imposing appropriate discipline, so that there is appropriate accountability. It is also important to create institutional safeguards to ensure proper oversight of the FBI's activities. This will lead to increased public confidence in the FBI as it does its important work.

Title I would create statutory jurisdiction for the DOJ Inspector General over allegations of misconduct in the FBI. It would bring the statutory authorities of the Justice Department's Inspector General into line with the administrative regulations adopted by the Attorney General on July 11, 2001, ensuring that there will be no return to a system in which the FBI enjoyed unique exemption for scrutiny by an independent Inspector General. It would also clarify that agency heads within the Department of Justice may be disciplined by the Attorney General, a proposition which has been assumed to exist for years, and which the Committee seeks to reinforce. At the same time, Title I requires reports to Congress regarding such disciplinary recommendations, ensuring a proper oversight role in these important decisions.

Title II would strengthen whistleblower protection for FBI employees and protect them from retaliation for reporting wrongdoing. Title VII would eliminate statutory disparities in disciplinary penalties for Senior Executive Service and non-SES personnel and require that the FBI's Office of Professional Responsibility complete annual reports on its activities, and that such reports be submitted to the Judiciary Committees through the Inspector General.

The Committee received testimony at its oversight hearings showing that, too often, the independence that is part of the FBI's culture crossed the line into arrogance. Senator Danforth expressed concern to the Committee about entrenched executives at the FBI who had created a closed and insular culture resistant to disclosure

of mistakes and to reforms.¹¹ His concern was echoed in testimony the Committee heard from experienced FBI Special Agents, including a unit chief in the FBI's own Office of Professional Responsibility, who told us of a "club" mentality among some Bureau executives who viewed any criticism or change as a threat to their careers.¹²

If there was one message from these witnesses, it was that FBI executives needed to be more willing to admit their mistakes. Too often their response was to shield the Bureau from embarrassment by sacrificing accountability and needed reform. For example, Senator Danforth testified that the FBI helped fan the flames of conspiracy theories at Waco by covering up evidence that it used pyrotechnic rounds, even though they had nothing to do with starting the fire.¹³ The FBI culture demanded covering up rather than admitting a mistake. Of course, as the FBI painfully discovered, the price for circling the wagons in this way can be the loss of public confidence.

The Justice Department Inspector General is in a position to conduct an independent investigation that enables the Attorney General and the FBI Director to hold FBI personnel accountable and learn the necessary lessons from mistakes. When Director Mueller was asked at his confirmation hearing about a separate FBI Inspector General, he replied, "If I were the Attorney General I might have some concern about a separate Inspector General feeding the perception that the FBI was a separate institution accountable only to itself. And I'm not certain in my own mind whether or not what the accountability you seek cannot be discharged by an Inspector General with appropriate personnel in the Department of Justice, as opposed to establishing another Inspector General in the FBI."¹⁴ Attorney General Ashcroft decided to follow this route, and Title I of the FBI Reform Act would codify his action, while allowing a future report assessing the necessity of future actions to implement the IG's new investigative jurisdiction.

At the Committee hearing on lessons of the Oklahoma City bombing case, Justice Department Inspector General Glenn A. Fine stated that this provision "should be in the law so that people will know it will continue, and that another attorney general . . . whatever he or she decides and knows . . . that it is the law that the inspector general has full authority throughout the Department of Justice."¹⁵ He further stated, "[o]n July 11, 2001, Attorney General Ashcroft issued an order that amended 28 CFR Parts 27 and 29 to provide the OIG with jurisdiction to investigate allegations of misconduct by FBI and DEA employees. However, legislation embodying the OIG's new jurisdictional authorities would ensure the permanency of this order. . . . A system that depends on permission from the Attorney General or the Deputy Attorney General for the

¹¹ Statement of John Danforth, United States Senator, U.S. Senate Committee on the Judiciary Hearing, "Oversight: Restoring Confidence in the FBI," June 20, 2001.

¹² U.S. Senate Committee on the Judiciary Hearing, "Reforming FBI Management: The Views From Inside and Out," July 18, 2001.

¹³ Statement of John Danforth, United States Senator, U.S. Senate Committee on the Judiciary Hearing, "Oversight: Restoring Confidence in the FBI," June 20, 2001, p. 36.

¹⁴ Statement of Robert S. Mueller III, U.S. Attorney in the Northern District of California, U.S. Senate Committee on the Judiciary Hearing, "Nominations Hearing," July 31, 2001, p. 65.

¹⁵ Statement of Glenn Fine, Inspector General, U.S. Senate Committee on the Judiciary Hearing, "Reforming the FBI in the 21st Century: Lessons of the Oklahoma City Bombing Case," March 21, 2002, p. 65.

OIG to investigate specific matters within the FBI suffers from a variety of problems. . . . [A]n ad hoc system does little to ensure that the OIG receives timely and thorough information from the FBI on allegations of misconduct so that we can decide whether to request authority to investigate the issue.”¹⁶

Michael R. Bromwich, Department of Justice Inspector General in 1994–1999, concurred, stating, “I think that all criminal matters and all administrative misconduct allegations at a certain level of employee or above should . . . go first to the Inspector General’s office, and it ought to be up to that office to refer things back to the FBI. . . . That is exactly the sort of system that has existed with respect to the internal affairs arms in other Justice Department components that have law enforcement functions—the Marshals Service, the Immigration Service, the Bureau of Prisons, and so forth.”¹⁷

Title II is designed to increase the current protections for whistleblowers within the FBI. The Committee heard disturbing testimony about retaliation against FBI Agents who are tasked to investigate their colleagues or who discuss issues with the Congress, either directly or through cooperation with the General Accounting Office, which assists in Congressional oversight.¹⁸ Therefore, Title II is important to ensure that the federal whistleblower protection laws protect FBI personnel to the greatest extent possible. Senator Grassley stressed the need for this provision and developing the language in the bill. The bill would extend whistleblower protections to employees who report wrongdoing to those who have supervisory authority over them in the chain of command or to Congress, and ensure that whistle blowers are provided with basic procedural protections, including the normal procedures and judicial review provided under the Administrative Procedure Act, if they are subjected to retaliation. It also would ensure that those who report wrongdoing to the Office of the Special Counsel have access to the normal Merit System Protection Board rights if retaliated against. Strong whistleblower protections also serve as a potent weapon in protecting the security of the FBI. When asked about the need for better whistleblower protection to help enhance the FBI’s security, Judge Webster testified, “I think the whistleblower protection as you provided for will be very useful in answering that problem.”¹⁹

The Committee heard highly probative testimony from current and retired FBI agents on this issue. John E. Roberts, Chief, Internal Investigative Unit, in the FBI Office of Professional Responsibility, FBI, testified, “To say that there is adequate protection in the FBI for Whistleblowers, is a position I cannot take. I can say that, based on my experience in the Ruby Ridge investigation and the Retirement Party investigation, investigations which I conducted, there are subtle and not so subtle acts of retaliation taken by senior executives in the FBI for disclosing misconduct on the

¹⁶ Answers of Glenn Fine, Inspector General, to written questions of Chairman Patrick Leahy, U.S. Senate Committee on the Judiciary Hearing, “Reforming the FBI in the 21st Century: Lessons of the Oklahoma City Bombing Case,” June 20, 2001.

¹⁷ Statement of Michael Bromwich, former Inspector General, U.S. Senate Committee on the Judiciary Hearing, “Oversight: Restoring Confidence in the FBI,” June 20, 2001, p. 96.

¹⁸ U.S. Senate Committee on the Judiciary Hearing, “Reforming FBI Management: The Views From Inside and Out,” July 18, 2001.

¹⁹ Statement of Judge William Webster, Former FBI Director, U.S. Senate Committee on the Judiciary Hearing, “Reforming the FBI in the 21st Century: Lessons of the Hanssen Espionage Case,” April 9, 2002, p. 28.

part of senior executives.”²⁰ Inspector General Glenn A. Fine concurred, stating, “Even with this [current] mechanism, we believe that some FBI employees still believe that they will face retaliation and their careers will be harmed if they report misconduct. . . . The Committee should consider whether the persons to whom FBI employees can raise whistleblower complaints—under current regulations the OIG, DOJ OPR, FBI OPR, the Attorney General, the Deputy Attorney General, the FBI Director, the FBI Deputy Director, or the highest ranking official in an FBI Field Office—is too limited. . . . [T]he Whistleblower Protection Act that covers most other federal employees (but not those in the FBI) provides a more expansive universe of people to whom employees can raise whistleblower complaints.”²¹ Title II provides for such expansion.

Title VII improves oversight and accountability in the FBI by addressing the issue of a double standard for discipline of senior executives. Internal investigations must lead to fair and just discipline. A troubling internal FBI study that was released at the Committee’s July hearing documented a double standard at work, with senior FBI executives receiving a slap on the wrist for the same kind of conduct that would result in serious discipline for lower level employees.²² At his confirmation hearing, Director Mueller said it is “very important that there be no double standards in accountability. There have been allegations that senior FBI officials are sometimes treated more leniently than more junior employees. Any such double standard would be fundamentally unfair and enormously destructive to employee morale.”²³

Title VII would embody that principle by eliminating the disparity in authorized punishments between Senior Executive Service members and other federal employees and requiring, for the first five years, that the annual report (already prepared) of the FBI’s Office of Professional Responsibility address the double-standard issue.

In response to written questions, Patrick J. Kiernan, Supervisory Special Agent in the FBI Law Enforcement Ethics Unit, stated, “The federal statute (5 U.S.C. Sec. 7542) limiting SES employees’ discipline to letters of censure, removal, or suspensions for more than 14 days definitely is a contributing factor to the ‘double standard’ in punishment. By excluding suspensions of 3, 5, 7, 10, or 14 days, the statute effectively ties the hands of the Adjudication Unit of the FBI. Suspensions of this lesser period of time are much more common than those over 14 days. However, the Adjudication Unit is precluded from using them against SES personnel. Therefore, when an infraction occurs that would normally fall within a suspension of 14 days or less, the Adjudication Unit either has to round-up or round-down. The rounding process seems to usually favor a member of the SES and results in a simple letter of censure. . . . This is not just a problem for the FBI, but for many fed-

²⁰ Statement of John E. Roberts, FBI’s Office of Professional Responsibility, Chief of Internal Investigative Unit, U.S. Senate Committee on the Judiciary Hearing, “Reforming FBI Management: The Views From Inside and Out,” July 18, 2001, p. 115.

²¹ Statement of Glenn A. Fine, Inspector General, U.S. Senate Committee on the Judiciary Hearing, “Oversight: Restoring Confidence in the FBI,” June 20, 2001, p. 46.

²² Law Enforcement Ethics Unit at the FBI Academy; FBI Senior Executive Service Accountability: A Higher Standard or a Double Standard (1999).

²³ Answers of Patrick Kiernan, Supervisory Special Agent in the FBI Law Enforcement Ethics Unit, to written questions of Chairman Patrick Leahy, U.S. Senate Committee on the Judiciary Hearing, “Reforming FBI Management: The Views From Inside and Out,” July 18, 2001.

eral agencies. The Office of Personnel Management advised that numerous federal agencies had complained to them over the course of the last several years that this statute took away the agency's flexibility in assessing discipline (SES report, p. 3)."²⁴ Title VII would provide the needed flexibility.

Title VII is also intended to improve oversight of FBI discipline. It requires that, for the next five years, the FBI's Office of Professional Responsibility complete an annual report of its activities and submit that report to the Judiciary Committees through the Department of Justice Office of Inspector General. Included in that report, in addition to basic information about its cases, will be an analysis of whether there is any "double standard" being applied to discipline of the FBI's higher ranking officials and an analysis of whether the Director, or others tasked with deciding the discipline to be imposed on FBI personnel, are following the recommendations being made by the career internal affairs officers who work at the Office of Professional Responsibility.

2. Security measures

The provisions of S. 1974 also address serious concerns regarding the security of the FBI and the important information which it possesses. The Hanssen espionage case was a tremendous shock to the nation and to the FBI. A trusted and experienced FBI Supervisory Special Agent was found to have sold many of the nation's most sensitive national security secrets to the Soviet Union and to Russia. Just as the Ames case forced the CIA to revamp its security program after 1994, the Hanssen case requires major changes in FBI security. Former FBI and CIA Director William Webster chaired a commission that reviewed lessons learned from the Hanssen case for the Attorney General and the FBI Director, and he presented his unclassified findings and recommendations to the Senate Judiciary Committee on April 9, 2002. He testified that the security provisions of the FBI Reform Act "offer promise for greater security and greater attention to security and greater understanding and training of security within the FBI."²⁵ Many of the original provisions of the FBI Reform Act that were based on the oversight activities of the Committee, were echoed in the recommendations of the Webster Commission, and still more of those recommendations were incorporated in the substitute amendment adopted by the Committee. FBI security is the primary aim of Titles III, IV, V, and VIII of S. 1974.

Title III of the FBI Reform Act would establish a Career Security Program in the FBI and Title IV would establish an FBI Counter-intelligence Polygraph Program for screening employees and contractors in exceptionally sensitive positions with specific safeguards, both of which were recommended by the Webster Commission. In addition, as a result of concerns about terrorist attacks against FBI targets and a lack of internal security also documented in the Webster Commission's report, Title V would authorize an FBI police force as part of comprehensive security enhancements.

²⁴ Answers of Patrick Kiernan, Supervisory Special Agent in the FBI Law Enforcement Ethics Unit, to written questions of Chairman Patrick Leahy, U.S. Senate Committee on the Judiciary Hearing, "Reforming FBI Management: The Views From Inside and Out," July 18, 2001.

²⁵ Statement of Judge William Webster, Former FBI Director, U.S. Senate Committee on the Judiciary Hearing, "Reforming the FBI in the 21st Century: Lessons of the Hanssen Espionage Case," April 9, 2002, p. 21.

Based on specific Webster Commission recommendations, Title VIII has been added to provide to enhance the security of the Department of Justice and the handling of Foreign Intelligence Surveillance Act (FISA) information. Judge Webster testified about S. 1974, stating, "Mr. Chairman, I believe that all of those suggestions which are incorporated in your bill offer promise for greater security and greater attention to security and greater understanding and training of security within the FBI."²⁶

The FBI Career Security Program in Title III would bring the FBI into line with other U.S. intelligence agencies that have strong career security professional cadres whose skills and leadership are dedicated to the protection of agency information, personnel, and facilities. The challenges of espionage, information technology vulnerability, and the FBI's high profile as a target of terrorist attack require that the FBI match or exceed the best security programs in the intelligence and national security community. This can only be achieved by a fundamental change that reverses the tendency, found too often in civilian agencies, to treat security as a secondary mission and security assignments as obstacles to career advancement. Before the Hanssen case, an FBI Special Agent experienced as a criminal investigator might be assigned for a few years to a security position and then move on without building continuity of security expertise. Turnover in FBI security work was high, and the top rank was Headquarters Section Chief.

Director Mueller has begun to change direction by creating an Assistant Director position to head a new Security Division and by supporting the principle of a Security Career Program.²⁷ Title III of the FBI Reform Act would provide the statutory mandate and tools to achieve this goal based on the experience of the Defense Department in reforming its acquisition career program. The key requirements are leadership and accountability in a Security Director, creation of security career program boards, designation of security positions, identification of security career paths requiring appropriate training and experience, and development of education programs for security professionals. To help ensure that security professionals gain stature comparable to Special Agents, the program would limit the preference for Special Agents in considering persons for security positions. FBI security managers would complete a security management course accredited by the Joint Security Training Consortium recently formed by the Intelligence Community and the Department of Defense. If such a course is not available, the FBI Director could substitute a comparable course.

In response to written questions, Kenneth H. Senser, Assistant Director in charge of the FBI Security Division, stated, "Currently, FBI Security Officers are not selected based on a specific set of required knowledge, skills, or abilities related to security. Security Officers experience a large turnover rate, receive little formal training and often have other collateral duties outside of the security field requiring them to split their attention between several program areas. The security field is not seen as career enhancing for

²⁶ Statement of Judge William Webster, Former FBI Director, U.S. Senate Committee on the Judiciary Hearing, "Reforming the FBI in the 21st Century: Lessons of the Hanssen Espionage Case," April 9, 2002, p. 21.

²⁷ It is the Committee's strong desire that the Webster Commission's recommendation that such position be one which reports directly to the Director, be heeded.

Special Agents and they are usually not held in high esteem within the organization. Security Officers chosen from a professional support track are not always taken seriously because they are not Special Agents. Both of these factors result in a lack of credibility and a recurring cycle where highly capable employees are not assigned to the security function because it is viewed as a waste of their talents. . . . Legislative standards could be helpful.”²⁸

The FBI Counterintelligence Polygraph Program that would be established under Title IV of the Act also addresses the security issue. Title IV recognizes the security value of polygraph screening, but provides specific safeguards for those who may be subject to adverse action based on polygraph exams. Screening procedures must address the problem of “false positive” responses, limit adverse actions taken solely by reason of physiological reactions in an examination, ensure quality assurance and control, and allow subjects to have prompt access to unclassified reports on examinations that relate to adverse actions against them. Title IV is based upon the simple conviction that increased security and protection of employee rights can and must coexist at the FBI.

Title V of the Act would provide long overdue statutory authorization for a permanent FBI Police force, to protect critical FBI facilities. It would provide the men and women who currently guard the highest risk targets with the same pay and benefits as members of the Uniformed Division of the United States Secret Service. Today the FBI police force operates under delegated authority from the General Services Administration and apparently has been unable to retain skilled personnel at a rate commensurate with the threat and the need for experienced leadership. The FBI Reform Act would bring the FBI police force generally into line not only with the Uniformed Division of the Secret Service, but also with the Capitol Police and the Supreme Court police. It is intended to be implemented in a manner consistent with the current Memorandum of Agreement between the FBI and the Metropolitan Police Force of the District of Columbia with respect to the delineation of areas surrounding FBI buildings and grounds covered in Washington, D.C., and the act is not intended to diminish the authority of any other law enforcement agency.

Title VIII responds to the Webster Commission’s statement that the Security and Emergency Planning Staff of the Justice Department “seems to suffer from many of the structural weaknesses that led us to recommend creation of an Office of Security in the Bureau, weaknesses such as inadequate resources and insufficient stature within the Department’s structure.”²⁹ The Commission also discussed the Department’s Office of Intelligence Policy and Review (“OIPR”), which handles Foreign Intelligence Surveillance Act (“FISA”) matters, and specifically noted that “the absence of secure computer links between the FBI and OIPR requires that classified FISA documents be carried by hand between DOJ and Headquarters, creating risks to the physical security of the docu-

²⁸ Answers of Kenneth Senser, Assistant Director in charge of FBI’s Security Division, to written questions of Chairman Patrick Leahy, U.S. Senate Committee on the Judiciary Hearing, “Reforming FBI Management: The Views From Inside and Out,” July 18, 2001.

²⁹ United States Department of Justice, Commission for the Review of FBI Security Programs; A Review of FBI Security Programs, p. 93 (2002).

ments.”³⁰ Title VIII would require a report from the Attorney General on plans to enhance Justice Department security and would authorize additional funds for the security staff and OIPR.

The OIPR authorization is consistent with an amendment for additional funding offered by Chairman Leahy to S. 2089, the “Counterintelligence Reform Act,” and accepted by the Senate Judiciary Committee when that legislation was reported by the Judiciary Committee in 2000 and included, in modified form, in the Intelligence Authorization Act for FY 2001.

3. Preparing the FBI for the 21st century

The Attorney General has directed Deputy Attorney General Thompson to lead a management review of the FBI, while Director Mueller has already begun reorganizing the Bureau. Congress must participate in reviewing the FBI’s structure and identifying its future priorities. The FBI is being called on today to protect the national security from terrorist and intelligence threats mounted from abroad. FBI investigations now extend overseas far more often because of our government’s decision to use law enforcement as an instrument of national security along with diplomacy, military deployments, and intelligence operations. At the same time, the FBI must continue to handle other uniquely federal areas of criminal enforcement, such as complex economic crime, complex criminal enterprises, civil rights, environmental, and antitrust enforcement. Title VI would require a set of reports to enable the Congress to engage the Executive branch in a constructive dialogue on building a more effective FBI for the future.

To help chart the FBI’s course, Title VI would direct the Attorney General to submit a comprehensive report on the legal authorities for FBI programs and activities. The FBI does not have express statutory authority for its intelligence and counterintelligence activities, but relies primarily on an Executive order for its basic legal authority to conduct these extensive and costly programs that are vital for protecting the United States against international terrorism.³¹ In the late 1970s, the Judiciary Committee considered enactment of a legislative charter for the FBI that would spell out its

³⁰ United States Department of Justice, Commission for the Review of FBI Security Programs; A Review of FBI Security Programs, p. 83 (2002).

³¹ Section 1.14 of Executive Order 12333 (1981) states: “Under the supervision of the Attorney General and pursuant to such regulations as the Attorney General may establish, the Director of the FBI shall:

(a) Within the United States conduct counterintelligence and coordinate counterintelligence activities of other agencies within the Intelligence Community. When a counterintelligence activity of the FBI involves military or civilian personnel of the Department of Defense, the FBI shall coordinate with the Department of Defense;

(b) Conduct counterintelligence activities outside the United States in coordination with the CIA as required by procedures agreed upon by the Director of Central Intelligence and the Attorney General;

(c) Conduct within the United States, when requested by Officials of the Intelligence Community designated by the President, activities undertaken to collect foreign intelligence or support foreign intelligence collection requirements of other agencies within the Intelligence Community, or, when requested by the Director of the National Security Agency, to support the communications security activities of the United States Government;

(d) Produce and disseminate foreign intelligence and counterintelligence; and

(e) Carry out or contract for research, development, and procurement of technical systems and devices relating to the functions authorized above.”

The National Security Act of 1947, as amended, defines the “intelligence community” in 50 U.S.C. 401a(4) to include “the intelligence elements of . . . the Federal Bureau of Investigation” and implies in 50 U.S.C. 401a(5) that the FBI conducts counterintelligence activities, but does not provide express statutory authority for FBI intelligence activities. By contrast, such express authority is provided for the CIA and the intelligence elements of the Department of Defense.

authorities and responsibilities. That proposal was set aside in 1980 despite determined efforts by then-Judiciary Committee Chairman Kennedy, FBI Director Webster, and Attorney General Civiletti to reach agreement. The time may be ripe to revive consideration of this effort.

The FBI is evaluating whether and how to continue to have responsibility for the broad range of investigations that it is currently expected to conduct. The extent to which criminal law enforcement has been over-federalized and responsibilities, which are not uniquely federal, should be handled primarily by the states is a matter that requires Congressional input. In addition, even among federal law enforcement agencies, federal law enforcement personnel perform redundant and overlapping functions and missions. The bill would direct the Attorney General to recommend whether the FBI should continue to have all its current investigative responsibilities, whether existing legal authority for any FBI program or activity should be modified or repealed, and whether the FBI must or should have express statutory authority for new or existing programs or activities.

Title VI recognizes that the task of modernizing FBI's information technology and management is as important as setting the FBI's future missions. This need was clearly demonstrated by the Webster Commission report and the report of the Justice Department Inspector General on the belated production of FBI documents in the Oklahoma City bombing case, as presented to the Committee at a hearing on March 21, 2002. Judiciary Committee oversight hearings have documented, and Director Mueller has acknowledged, that the FBI must overcome years of neglect in this regard. Congress is providing the funds requested for information technology improvements, especially in the FY 2002 Counterterrorism Supplemental. The Congress must ensure, however, that the FBI can and does use these funds effectively.

There is concern that the FBI may need greater flexibility than is allowed under current law to procure new information technologies. Title VI directs the Attorney General to address these concerns in a comprehensive report on a ten-point plan for FBI information management and technology. Bob Dies, FBI Chief Technology Officer, testified about S. 1974, "The part of it that relates to information management, frankly, I thought you had both creative and constructive ideas in there, and I would hope you're successful in getting these enacted."³²

Finally, Title VI would require the Comptroller General to investigate and complete a report on how statistics are reported and used by Federal law enforcement agencies, including the FBI. Senator Grassley has focused attention on the question whether the FBI and other agencies may be double-counting criminal investigations and arrests in the reporting of accomplishments. There is also a need to ascertain whether the FBI and other agencies properly use the statistics which they compile in making management decisions, including decisions to prioritize certain programs and the evaluation either of a program or an employee's performance. It is important to get the facts and recommendations that put the FBI

³² Statement of Bob Dies, FBI Chief Technology Officer, U.S. Senate Committee on the Judiciary Hearing, "Reforming the FBI in the 21st Century: Lessons of the Oklahoma City Bombing Case," March 21, 2002, p. 65.

into the context of the full spectrum of Federal law enforcement agencies. Title VI would ensure that the GAO can complete this important task by requiring agencies to comply with its requests for the information that is necessary to assist in preparing this report.

4. Continuing oversight responsibilities

The FBI Reform Act of 2002 is just one part of the Judiciary Committee's bipartisan, hands-on approach to FBI reform. Committee oversight hearings considered other significant issues arising from the Justice Department Inspector General's report on the belated production of documents in the Oklahoma City bombing case and the report of Judge Webster's Commission on the security lessons of the Robert Hanssen espionage case. The Committee also will also monitor the actions and goals of Director Mueller and Deputy Attorney General Thompson in reorganizing the FBI and charting its management course for the future.

At the same time, the Committee is focusing oversight attention on key aspects of FBI and law enforcement performance in connection with the September 11 terrorist attacks and the lessons learned for developing an effective counterterrorism and homeland security program. As contemplated by the sunset provisions in the USA PATRIOT Act, the Committee must monitor the implementation of new surveillance and investigative powers provided to strengthen counterterrorism efforts and, in some provisions, law enforcement and counterintelligence generally.

The FBI Reform Act is designed to strengthen the FBI as an institution that has a unique role as both a law enforcement agency and a member of the intelligence community. As the Judiciary Committee continues its oversight work and more is learned about recent FBI performance, additional legislation may prove necessary. Especially important will be the lessons from the attacks of September 11, 2001, the anthrax attacks, and implementation of the USA PATRIOT Act and other counterterrorism measures. Strengthening the FBI cannot be accomplished overnight, but enactment of the FBI Reform Act of 2002 will take an important step into the future.

B. SECTION-BY-SECTION ANALYSIS OF S. 1974

Section 1. Short title

This section provides a short title: the "Federal Bureau of Investigation Reform Act of 2002."

Title I. Improving FBI Oversight. Title I provides for improved Department of Justice ("DOJ") and Congressional oversight of the FBI by ensuring that the DOJ Office of the Inspector General ("OIG") is authorized by statute to investigate allegations of misconduct at the FBI and requiring a report to the Judiciary Committees on how the OIG carries out this new authority.

Section 101. Authority of Department of Justice Inspector General

This section would amend Section 8E of the Inspector General Act of 1978 (5 U.S.C. App.) to provide explicit statutory authority for the OIG to investigate all allegations of criminal or administrative misconduct by DOJ employees, including FBI personnel. The

OIG is also authorized to refer certain matters to the FBI Office of Professional Responsibility or to the internal affairs office of the appropriate component of the Department. The Attorney General is directed to promulgate regulations implementing this OIG authority.

For many years, the FBI was excluded from OIG jurisdiction and the FBI's own internal Office of Professional Responsibility had sole authority to investigate FBI personnel misconduct, unless the Attorney General made an exception. The exclusive domains of the FBI and the Drug Enforcement Administration to investigate their own misconduct were unique in the Department and created the appearance of a conflict of interest. On July 11, 2001, Attorney General Ashcroft issued a new rule expanding the OIG's jurisdiction over the FBI and DEA. This section is consistent with, and codifies, the Attorney General's new rule. This section clarifies and buttresses the long accepted proposition that the Attorney General has the authority to discipline agency heads within the Department of Justice and ensures appropriate Congressional oversight regarding such decisions.

Section 102. Review of the Department of Justice

To ensure that the OIG has the necessary structure and resources to effectively assume its new jurisdiction over the FBI and that the Congress is fully informed of such needs, this subsection requires the Inspector General to: (1) appoint an official to help supervise and coordinate oversight operations and programs of the FBI during the transition period; and (2) conduct a comprehensive study of the FBI and report back to the Judiciary Committees with a plan for auditing and evaluating various parts of FBI (including information technology) and for effective continued OIG oversight. The Attorney General is required to report back to the Judiciary Committee on whether an Inspector General for the FBI should be established. This section requires that the Attorney General similarly report on what actions are being taken, or need to be taken, in order to ensure proper investigation and discipline of FBI employees, whether uniform standards for investigating Department of Justice misconduct are being established, and whether recommended disciplinary guidelines should be established for Department of Justice employees who engage in misconduct.

Title II. Whistleblower Protection. This title amends Title 5, U.S.C. §2303, to enhance the whistle blower protection provided to FBI employees and protect them from retaliation.

Section 201. Providing whistle blower protection for FBI employees

Section 201 would amend Section 2303 of title 5, United States Code, to expand the types of disclosures that trigger whistle blower protections by protecting disclosures, which the employee "reasonably believes" evidence misconduct, to the OIG, the Congress, a person with supervisory authority over the employee, or the Special Counsel (an office associated with enforcement before the Merit Systems Protection Board ("MSPB") provided for by 5 U.S.C. §1214). The employees' "reasonable belief" is intended to be interpreted using a normal, objective standard which courts apply in a wide variety of cases both inside and outside the governmental context, and is specifically not intended to adopt the standard set forth

in *LaChance v. White*, 174 F.3d 1378 (Fed. Cir. 1999). The amendment would also ensure that the procedural protections of the Administrative Procedure Act, including but not limited to, 5 U.S.C. sections 554–57 and 701–706, would be followed in cases where a complaint of retaliation was made by an FBI employee. These procedural protections include, among other things, an impartial decision maker and decision based on the “record” of any proceedings without *ex parte* contacts, and judicial review as provided. Current laws and regulations which allow for the protection of classified material would also be available for such proceedings in appropriate situations and upon proper showings. The amendment, in new subsection (c), provides an individual right of action as provided under Chapter 12 of Title 5 before the MSPB. The amendment, in new subsection (d), requires the Attorney General to prescribe regulations to ensure that the title is properly enforced at the FBI.

Title III. FBI Security Career Program. Title III would require the FBI to establish a career security program to enhance the internal security of the FBI and ensure that appropriate management tools and resources are devoted to that task. Security professional career development requirements are modeled generally on the statutory Department of Defense Acquisition Career Program.

Section 301. Security management policies

Section 301 would require the Attorney General to establish policies and procedures for career management of FBI security personnel.

Section 302. Director of the Federal Bureau of Investigation

Section 302 would authorize the Attorney General to delegate to the FBI Director the Attorney General’s duties with respect to the FBI security workforce and sets forth that the security career program will cover both headquarters and the FBI field offices.

Section 303. Director of security

Section 303 would direct the FBI Director to appoint a Security Director. It is the Committee’s intention that this official have unfettered, direct access to the Director of the FBI. The Security Director may have such other title as the FBI Director may determine. However, the Security Director not be an official with extensive non-security responsibilities that would dilute his or her focus on security matters.

Section 304. Security career program boards

Section 304 would provide for the establishment of a security career program board to advise in managing hiring, training, education, and career development.

Section 305. Designation of security positions

Section 305 would direct the FBI Director to designate certain positions as security positions, with responsibility for personnel security and access control, information systems security, information assurance, physical security, technical surveillance countermeasures, operational, program and industrial security, and information security and classification management.

Sections 306. Career development

Section 306 would require that career paths to senior positions be published. FBI Special Agents would not have preference for a security position, and no positions would be restricted to Special Agents unless the Attorney General makes a special determination. All FBI personnel would have the opportunity to acquire the education, training and experience needed for senior security positions. The Attorney General would ensure that policies are designed to select the best qualified individuals, consistent with other applicable law. Consideration would also be given to the need for a balanced workforce.

Section 307. General education, training, and experience requirements

Section 307 would direct that education, training, and experience requirements would be established for each position. Before assignment as manager or deputy manager of a significant security program, a person would have to complete a security program management course accredited by the Joint Department of Defense-Intelligence Security Training Consortium or determined to be comparable by the Director, and have 6 years security experience including 2 years in a similar program.

Section 308. Education and training programs

Section 308 would direct the Director, in consultation with the Director of Central Intelligence and Secretary of Defense, to establish education and training programs for FBI security personnel that are, to the maximum extent practical, uniform with Intelligence and Department of Defense programs.

Section 309. Office of Personnel Management approval

Section 309 would set forth the process for approval of requirements set forth under section 307.

Title IV. FBI counterintelligence polygraph program. This title would require the Attorney General to establish an FBI Counterintelligence Polygraph Program for personnel in exceptionally sensitive positions that reflects consideration of the results of a pending National Academy of Sciences review of the validity of the polygraph within 6 months after publication of that review. The regulations would be prescribed in accordance with the Administrative Procedures Act. A similar requirement for the Department of Energy was passed in the latest Defense Authorization Act.

Section 401. Definitions

Section 401 would define the term "polygraph program" to mean the counterintelligence screening polygraph program established under section 402. The term "Polygraph Review" would be defined to mean the review of the scientific validity of the polygraph for counterintelligence screening purposes conducted by the Committee to Review the Scientific Evidence on the Polygraph of the National Academy of Sciences.

Section 402. Establishment of program

Section 402 would require the establishment of a counterintelligence screening polygraph program consisting of periodic poly-

graph examinations of employees and contractors in positions, as specified by the Director, as exceptionally sensitive. This program shall be established within 6 months of the publication of the results of the report of the Committee to Review the Scientific Evidence on the Polygraph of the National Academy of Sciences.

Section 403. Regulations

Section 403 would direct that the program have procedures that address “false positive” results and ensure quality assurance and control in accordance with guidance from the Department of Defense Polygraph Institute and the DCI. No adverse personnel action could be taken solely by reason of physiological reaction on an exam without further investigation and personal decision by the Director. Employees could have prompt access to unclassified reports of their exams that relate to adverse personnel action. It is intended that the FBI develop program to use the polygraph as a tool to enhance its security, but not that the polygraph be used as a substitute for independent judgment and investigation, which are the hallmarks of a strong security program.

Section 404. Report on further enhancement of FBI personnel security program

Section 404 would require a report within 9 months of the enactment of the Act on any further legislative action appropriate in the personnel security area.

Title V. FBI police. This title would provide statutory authorization for an already existing FBI police force that protects FBI buildings and adjacent streets. This police force is important to protect the FBI both from terrorist attack as well as ensuring that sensitive information cannot be easily smuggled out of the FBI. Currently, the FBI police suffer from a high rate of turnover due to lower pay and fewer benefits than the Uniformed Division of Secret Service or Capitol and Supreme Court police. This title would close this disparity.

Section 501. Definitions

Section 501 would define the terms “Director,” “FBI buildings and grounds,” and “FBI police” as used in the title.

Section 502. Establishment of FBI police; duties

Section 502 would authorize the FBI Director to establish the FBI police, subject to the Attorney General’s supervision, to protect persons and property within FBI buildings and grounds, including adjacent streets and sidewalks within 500 feet. FBI buildings and grounds would include any building occupied by the FBI and subject to FBI supervision and control, the land on which such building is situated, and enclosed passageways connecting such buildings. FBI police would be uniformed representatives of the FBI with authority to make arrests and otherwise enforce federal and D.C. laws, carry firearms, prevent breaches of the peace, suppress unlawful affrays and unlawful assemblies, and hold the same powers as sheriffs and constables. FBI police would not have authority to serve civil process. Pay and benefits would be equivalent to pay and benefits for the Secret Service Uniformed Division.

Section 503. Authority of metropolitan police force

Section 503 would provide that the authority of the Washington, D.C. Metropolitan Police (“MPD”) would not be affected by this title. The Committee intends that the terms of the current Memorandum of Understanding between the FBI and the MPD, including the geographic bounds of FBI police jurisdiction, would not be altered by this section. This section is intended to enhance the ability of the FBI to retain qualified employees and to protect its facilities, it is not intended to diminish the police powers or authority of the MPD or of any other federal, state or local law enforcement agency.

Title VI. Reports. This title would require two separate reports by the Attorney General and one by the General Accounting Office.

Section 601. Report on legal authority for FBI programs and activities

Section 601 would require the Attorney General to submit a report to Congress on the legal authority for FBI programs and activities, identifying those that have express statutory authority and those that do not. The FBI does not have a statutory charter. One was proposed in 1979 but never enacted. Many FBI functions including its national intelligence and counterintelligence activities are authorized by Executive order rather than by statute, which means they could be revoked by future Executive order unless legislation is enacted. This section also requires the Attorney General to recommend the criminal statutes for which the FBI should have investigative responsibility, whether the authority for any FBI program or activity should be modified or repealed, whether the FBI should have express statutory authority for any program or activity for which it does not currently have such authority, and whether the FBI should have authority for any new program or activity. The Committee intends that the FBI evaluate which of its current programs are key to its future mission, and which are not. For those programs which it needs additional authority, the Committee requires its recommendations. For those programs upon which the FBI believes it should not longer focus, the Committee intends that the FBI recommend appropriate “exit strategies” so that law enforcement can be shifted to other local, state, and federal agencies.

Section 602. Report on FBI information management and technology

Section 602 would require the Attorney General to submit a report on FBI information management and technology, including whether additional authority is needed to waive normal procurement regulations in order for the FBI to effectively perform its functions. The report would provide the results of pending Justice Management Council studies and Inspector General audits and would require submission of a 10-point plan for improving FBI information management and technology to ensure that: (1) appropriate FBI technology management positions are filled by personnel with commercial sector experience; (2) access to the most sensitive information is audited so that suspicious activity is subject to near contemporaneous review; (3) critical information systems employ a public key infrastructure; (4) security features are tested by the National Security Agency; (5) FBI employees receive annual in-

struction in records and information management; (6) a research and development reserve is established; (7) undue requirements for less costly software purchases are eliminated; (8) contracting with an expert technology partner is considered; (9) procedures are instituted to procure through contracts of other agencies as necessary; and (10) system upgrades are tested before operational deployment.

Section 603. GAO report on crime statistics reporting

Section 603 would require the General Accounting Office to investigate and report on how crime statistics are counted, reported, and used by Federal law enforcement agencies. Specifically, the report would identify policies that allow credit for a single case to be claimed or reported by more than one law enforcement agency, the conditions that allow such reporting to occur, the number of such cases reported during a 4-year period, similar multiple claims of credit for arrests, the use or misuse of such statistics for administrative and management purposes, and relevant definitions. The report would include recommendations for how to eliminate unwarranted and duplicative reporting and whether such statistics are being improperly used for management and administrative purposes, including whether enforcement priorities or career advancement are overly dependent on the generation of such statistics. Federal law enforcement agencies would be required to comply with GAO requests for information necessary to prepare the report.

Title VII. Ending the Double Standard. This title would address the issue of the “double standard” in the FBI, to prevent lower level employees from being more harshly disciplined than senior FBI officials for the same misconduct. Indeed, it is the Committee’s intention that higher level employees be held to a more rigorous standard of good conduct. Section 7542 of title 5, United States Code, would be amended to allow disciplinary suspensions of SES members for 14 days or less, as is the case for other federal personnel. Current law provides only for suspension “for more than 14 days.” The substitute amendment adopted by the Committee adds section 702 to require submission of certain reports to be completed by the FBI Office of Professional Responsibility.

Section 701. Allowing disciplinary suspensions of members of the senior executive service for 14 days or less

This section would lift the minimum of 14 days suspension that applies in the FBI’s SES disciplinary cases and thereby provide additional options for discipline in SES cases and encourage equality of treatment. The current inflexibility of disciplinary options applicable to SES officials was cited at a Senate Judiciary Committee oversight hearing in July, 2001, as one underlying reason for the “double standard” in FBI discipline. In effect, those deciding the discipline of SES employees are often left with the choice of an overly harsh penalty or no penalty at all—so they decide not to impose any meaningful disciplinary action. This provision would remove that rationale for not imposing meaningful discipline on high level employees.

Section 702. Submitting office of professional responsibility reports to congressional committees

This section would require the OIG to submit to the Judiciary Committees, for five years, annual reports to be prepared by the FBI Office of Professional Responsibility summarizing its investigations, recommendations, and their disposition, and also would require that such annual reports include an analysis of whether any double standard is being employed for FBI disciplinary action. It is intended that both the Inspector General and the Committee monitor closely for the next five years the progress being made on the imposition of discipline at the FBI.

Title VIII. Enhancing Security at the Department of Justice. The substitute amendment adopted by the Committee adds this title to implement recommendations of the Webster Commission for enhancing security at the Department of Justice, which handles sensitive FBI and national security information, and for secure communication of information shared between the FBI and the DOJ Office of Intelligence Policy and Review regarding Foreign Intelligence Surveillance Act matters.

Section 801. Report on the protection of security and information at the Department of Justice

This section would require the Attorney General to submit a report to Congress on the manner in which the DOJ Security and Emergency Planning Staff, Office of Intelligence Policy and Review, and DOJ Chief Information Officer plan to improve the protection of security and information at DOJ, including a plan to establish secure communications between the FBI and OIPR for processing information related to the Foreign Intelligence Surveillance Act.

Section 802. Authorization for increased resources to protect security and information

This section would authorize funds for the DOJ Security and Emergency Planning Staff to meet the increased demands to provide personnel, physical, information, technical, and litigation security for the DOJ, to prepare for terrorist threats and other emergencies, and to review security compliance by DOJ components. Amounts authorized would be \$13 million for FY 03, \$17 million for FY 04, and \$22 million for FY 05.

Section 803. Authorization for increased resources to fulfill national security mission of the Department of Justice

This section would authorize funds for the DOJ Office of Intelligence Policy and Review to help meet the increased personnel demands to combat terrorism, process applications to the Foreign Intelligence Surveillance Court, participate effectively in counterespionage investigations, provide policy analysis and oversight on national security matters, and enhance computer and telecommunications security. Amounts authorized would be \$7 million for FY 03, \$7.5 million for FY 04, and \$8 million for FY 05.

VI. CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with paragraph 11(a) of rule XXVI of the standing Rules of the Senate, the Committee sets forth, with respect to the

bill, S. 1974, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 403 of the Congressional Budget Act of 1974:

MAY 6, 2002.

Hon. PATRICK J. LEAHY,
Chairman, Committee on the Judiciary,
United States Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 1974, the Federal Bureau of Investigation Reform Act of 2002.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Mark Grabowicz.

Sincerely,

DAN L. CRIPPEN.

Enclosure.

S. 1974—Federal Bureau of Investigation Reform Act of 2002

Summary: S. 1974 would direct the Attorney General and the Director of the Federal Bureau of Investigation (FBI) to implement certain management reforms and take other measures to improve oversight and security at the FBI. The bill would upgrade the pay and benefits of the FBI police force to equal the compensation package of the United States Secret Service Uniformed Division, beginning January 1, 2003. S. 1974 also would require the General Accounting Office and the Department of Justice (DOJ) to prepare several reports, mostly relating to security and management issues. Finally, the bill would authorize the appropriation of:

A total of \$52 million over the 2003–2005 period for DOJ's Security and Emergency Planning Staff to improve security in the agency's physical plant and computer systems and to prepare for terrorist threats and other emergencies; and

A total of \$23 million over the 2003–2005 period for DOJ's Office of Intelligence Policy and Review to combat terrorism and espionage, analyze national security policy, and improve its security.

Assuming appropriation of the necessary amounts, CBO estimates that implementing S. 1974 would cost \$90 million over the 2003–2007 period. This legislation would not affect direct spending or receipts, so pay-as-you-go procedures would not apply. S. 1974 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would not affect the budgets of state, local, or tribal governments.

Estimated cost to the Federal Government: The estimated budgetary impact of S. 1974 is shown in the following table. The costs of this legislation fall within budget function 750 (administration of justice).

	By fiscal year, in millions of dollars—				
	2003	2004	2005	2006	2007
CHANGES IN SPENDING SUBJECT TO APPROPRIATION					
Upgraded pay and benefits for FBI police:					
Estimated authorization level	2	3	3	3	3
Estimated outlays	2	3	3	3	3
Security and emergency planning staff:					
Authorization level	13	17	22	0	0

	By fiscal year, in millions of dollars—				
	2003	2004	2005	2006	2007
Estimated outlays	10	16	21	4	0
Office of intelligence policy and review:					
Authorization level	7	8	8	0	0
Estimated outlays	6	7	8	2	0
Reports and management reforms:					
Estimated authorization level	1	(¹)	(¹)	(¹)	(¹)
Estimated outlays	1	(¹)	(¹)	(¹)	(¹)
Total changes:					
Estimated authorization level	23	28	33	3	3
Estimated outlays	19	26	32	9	3

¹ Less than \$500,000.

Basis of estimate: For this estimate, CBO assumes that the authorized amounts will be appropriated by the beginning of each fiscal year and that outlays will follow the historical spending rates for these activities.

Based on information from the FBI, CBO estimates that implementing the provisions of S. 1974 relating to pay and benefits for about 200 members of the FBI police force would cost about \$2 million in fiscal year 2003 and about \$3 million in each year thereafter.

CBO estimates that the reports and management reforms required by the bill would cost about \$1 million in fiscal year 2003 and less than \$500,000 in each year thereafter, subject to the availability of appropriations.

Pay-as-you-go considerations: None.

Intergovernmental and private-sector impact: S. 1974 contains no intergovernmental or private-sector mandates as defined in UMRA and would not affect the budgets of state, local, or tribal governments.

Estimate prepared by: Federal costs: Mark Grabowicz; Impact on state, local, and tribal governments: Angela Seitz; Impact on the private sector: Paige Piper/Bach.

Estimate approved by: Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

VII. REGULATORY IMPACT STATEMENT

In compliance with paragraph 11(b)(1), rule XXVI of the Standing Rules of the Senate, the Committee, after due consideration, concludes that S. 1974 will not have significant regulatory impact.

VIII. CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by S. 1974, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, and existing law in which no change is proposed is shown in roman):

UNITED STATES CODE

* * * * *

TITLE 5—GOVERNMENT ORGANIZATION
AND EMPLOYEES

* * * * *

PART III—EMPLOYEES

Subpart A—General Provisions

Chapter	Section
21. Definitions	2101
23. Merit system principles	2301

* * * * *

§ 2303. Prohibited personnel practices in the Federal Bureau of Investigation

[(a) Any employee of the Federal Bureau of Investigation who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority, take or fail to take a personnel action with respect to any employee of the Bureau as a reprisal for a disclosure of information by the employee to the Attorney General (or an employee designated by the Attorney General for such purpose) which the employee or applicant reasonably believes evidences—

[(1) a violation of any law, rule, or regulation, or

[(2) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

[For the purpose of this subsection, “personnel action” means any action described in clauses (i) through (x) of section 2302(a)(2)(A) of this title with respect to an employee in, or applicant for, a position in the Bureau (other than a position of a confidential, policy-determining, policymaking, or policy-advocating character).

[(b) The Attorney General shall prescribe regulations to ensure that such a personnel action shall not be taken against an employee of the Bureau as a reprisal for any disclosure of information described in subsection (a) of this section.

[(c) The President shall provide for the enforcement of this section in a manner consistent with applicable provisions of sections 1214 and 1221 of this title.]

§2303. Prohibited personnel practices in the Federal Bureau of Investigation

(a) *DEFINITION.*—In this section, the term “personnel action” means any action described in clauses (i) through (x) of section 2302(a)(2)(A).

(b) *PROHIBITED PRACTICES.*—Any employee of the Federal Bureau of Investigation who has the authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority, take or fail to take a personnel action with respect to any employee of the Bureau or because of—

(1) any disclosure of information by the employee to the Attorney General (or an employee designated by the Attorney General for such purpose), a supervisor of the employee, the Inspector General for the Department of Justice, or a Member of Congress that the employee reasonably believes evidences—

(A) a violation of any law, rule, or regulation; or

(B) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety; or

(2) any disclosure of information by the employee to the Special Counsel of information that the employee reasonably believes evidences—

(A) a violation of any law, rule, or regulation; or

(B) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety,

if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs.

(c) *INDIVIDUAL RIGHT OF ACTION.*—Chapter 12 of this title shall apply to an employee of the Federal Bureau of Investigation who claims that a personnel action has been taken under this section against the employee as a reprisal for any disclosure of information described in subsection (b)(2).

(d) *REGULATIONS.*—The Attorney General shall prescribe regulations to ensure that a personnel action under this section shall not be taken against an employee of the Federal Bureau of Investigation as a reprisal for any disclosure of information described in subsection (b)(1), and shall provide for the enforcement of such regulations in a manner consistent with applicable provisions of sections 1214 and 1221, and in accordance with the procedures set forth in sections 554 through 557 and 701 through 706.

* * * * *

**SUBPART F—LABOR-MANAGEMENT AND
EMPLOYEE RELATIONS**

CHAPTER 71—LABOR-MANAGEMENT RELATIONS

Subchapter I—General Provisions

* * * * *

CHAPTER 75—ADVERSE ACTIONS

* * * * *

Subchapter V—Senior Executive Service

7541. Definitions.

7542. Actions covered.

* * * * *

§ 7542. Actions covered

This subchapter applies to a removal from the civil service or suspension [for more than 14 days], but does not apply to an action initiated under section 1215 of this title, to a suspension or removal under section 7532 of this title, or to a removal under section 3592 or 3595 of this title.

* * * * *

TITLE 5—GOVERNMENT ORGANIZATION AND EMPLOYEES

APPENDIXES

Appendix	Page
1. Reorganization Plans	3
2. Federal Advisory Committee Act	531
3. Inspector General Act of 1978	573

* * * * *

APPENDIX 3.—INSPECTOR GENERAL ACT OF 1978

Sec.

1. Short title.

* * * * *

8E. Special provisions concerning the Department of Justice.

§ 8E. Special provisions concerning the Department of Justice

(a)(1) Notwithstanding the last two sentences of section 3(a), the Inspector General shall be under the authority, direction, and control of the Attorney General with respect to audits or investigations, or the issuance of subpoenas, which require access to sensitive information concerning—

* * * * *

(b) In carrying out the duties and responsibilities specified in this Act, the Inspector General of the Department of Justice—

(1) may initiate, conduct and supervise such audits and investigations in the Department of Justice as the Inspector General considers appropriate;

[(2) shall give particular regard to the activities of the Counsel, Office of Professional Responsibility of the Department and the audit, internal investigative, and inspection units outside the Office of Inspector General with a view toward avoiding duplication and insuring effective coordination and cooperation; and

[(3) shall refer to the Counsel, Office of Professional Responsibility of the Department for investigation, information or allegations relating to the conduct of an officer or employee of the Department of Justice employed in an attorney, criminal investigative, or law enforcement position that is or may be a violation of law, regulation, or order of the Department or any other applicable standard of conduct, except that no such referral shall be made if the officer or employee is employed in the Office of Professional Responsibility of the Department.]

(2) except as specified in subsection (a) and paragraph (3), may investigate allegations of criminal wrongdoing or administrative misconduct by an employee of the Department of Justice, or may, in the discretion of the Inspector General, refer such allegations to the Office of Professional Responsibility or the internal affairs office of the appropriate component of the Department of Justice;

(3) shall refer to the Counsel, Office of Professional Responsibility of the Department of Justice, allegations of misconduct involving Department attorneys, investigators, or law enforcement personnel, where the allegations relate to the exercise of the authority of an attorney to investigate, litigate, or provide legal advice, except that no such referral shall be made if the attorney is employed in the Office of Professional Responsibility;

(4) may investigate allegations of criminal wrongdoing or administrative misconduct, including a failure to properly discipline employees, by a person who is the head of any agency or component of the Department of Justice; and

(5) shall forward the results of any investigation conducted under paragraph (4), along with any appropriate recommendation for disciplinary action, to the Attorney General, who is authorized to take appropriate disciplinary action.

(c) Any report required to be transmitted by the Attorney General to the appropriate committees or subcommittees of the Congress under section 5(d) shall also be transmitted, within the seven-day period specified under such section, to the Committees on the Judiciary and Governmental Affairs of the Senate and the Committees on the Judiciary and Governmental Operations of the House of Representatives.

(d) If the Attorney General does not follow any recommendation of the Inspector General made under subsection (b)(5), the Attorney General shall submit a report to the chairperson and ranking member of the Committees on the Judiciary of the Senate and the House of Representatives that sets forth the recommendation of the Inspector General and the reasons of the Attorney General for not following that recommendation.

(e) The Attorney General shall ensure by regulation that any component of the Department of Justice receiving a nonfrivolous allegation of criminal wrongdoing or administrative misconduct by an employee of the Department of Justice shall report that information to the Inspector General.

* * * * *